IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2549 OF 2006

Smt. Varsha Rubin T. Zaveri ... Petitioner

Vs.

Shri Pannalal Khimji Chheda & Ors. ... Respondents

Mr. S.R. Chitnis, senior counsel with Mr. Jayant Gohil for the petitioner.

Mr. J.P. Patel for respondents 1 to 4.

Ms. R.M. Gadvi, A.P.P. for the State.

CORAM : SMT. RANJANA DESAI, J.

DATED : 11TH DECEMBER, 2006.

P.C. :-

1. The petitioner has challenged the order dated 8/11/2006 passed by the judge presiding over Court Room No.23 of the Small Causes Court at Bombay on miscellaneous application made in R.A.E. Suit No.402 of 1985.

2. According to the petitioner, respondents 1 to 4 have committed offence of fabricating false evidence. According to the petitioner, the respondents have committed offences punishable under sections 191,

200, 463, 464 and 471 read with section 34 and 120(b) of the Indian Penal Code (for short, "I.P.C."). The petitioner, therefore, filed application before the trial court praying that the court may take cognizance of the offence under section 340 of the the Code of Criminal Procedure (for short, "Cr.P.C."). The impugned order has been passed on the said application.

3. I have heard Mr. Chitnis, the learned senior counsel appearing for the petitioner. Mr. Chitnis contended that the impugned order indicates total non-application of mind on the part of the learned judge. He submitted that the learned judge has not applied his mind to the judgment of the Supreme Court in ***Pritish v. State of Maharashtra & Ors., AIR 2002 SC 236***, where the Supreme Court has considered the provisions of section 340, 341 and 343 of the Cr.P.C. and laid down principles underlying these sections. He submitted that the learned judge is wrong in observing that the proceedings before him are of civil nature and that both sides have an opportunity to adduce evidence regarding the alleged forgery. He contended that in the circumstances, this court should set aside the order and remand the matter to the trial court for considering the application afresh in the light of the judgment of the Supreme Court in ***Pritish' case (supra)*** and the relevant provisions of the Cr.P.C. Mr. Chitnis contended that by way of abundant caution

the petitioner has added the original defendants, who according to him have committed the alleged offence, as party respondents though in law they have no locus.

4. I find substance in the submissions of Mr. Chitnis. This is a very glaring instance of non-application of mind. It appears that the learned judge has not applied his mind at all to the relevant provisions of law. He has referred to section 340 of the Civil Procedure Code (for short, C.P.C.) when the arguments were based on section 340 of Cr.P.C. I would have condoned this as a typographical error but it does not appear to be so. At two places, the learned judge has referred to C.P.C. I wish the learned judge had taken care to check his order before signing it. I also feel that the learned judge should examine the matter again in the light of the judgment of the Supreme Court in ***Pritish' case (supra)*** more particularly paragraphs 11, 12, 13, 14, 15 and 16 thereof. The learned judge has also not appreciated the observations of the Supreme Court that there is no statutory requirement to afford an opportunity of hearing to the persons against whom the court might file complaint before the Magistrate for initiating prosecution proceedings and the further observation of the Supreme Court that once the prosecution proceedings commence the person against whom the accusation is made has a legal right to be heard. Such a legal

protection is incorporated in the scheme of the Cr.P.C. but principles of natural justice would not be hampered by not hearing the person concerned at the stage of deciding whether such person should be proceeded against or not. The learned judge should have also appreciated the clear enunciation of law by the Supreme Court that the person against whom the complaint is made has a legal right to be heard whether he should be tried for the offence or not but such a legal right is envisaged only when the Magistrate calls the accused to appear before him and the person concerned has then the right to participate in the pre-trial inquiry envisaged in section 239 of the Cr.P.C. and at that stage he can persuade the Magistrate to discharge him, but the court is under no obligation to hear the person accused of the offence before filing complaint before Magistrate for initiating prosecution proceedings. Such person would however have a right of appeal under section 341 of the Cr.P.C. In the circumstances, the learned judge should have seen that the conclusion is inevitable that before filing complaint before the Magistrate for initiating proceedings, respondents 1 to 4 are not required to be heard. There is no such legal obligation. I, therefore, deem it fit to remand the matter to the trial court for passing appropriate orders after considering the relevant provisions of the Cr.P.C. Hence, the following order.

O R D E R

5. The impugned order dated 8/11/2006 is quashed and set aside. The learned judge presiding over Court Room No.23 of the Small Causes Court at Bombay is directed to hear the application filed by the petitioner afresh after considering the relevant provisions of section 340 of the Cr.P.C. and the judgment of the Supreme Court in ***Pritish' case (supra)*** and any other judgments to which his attention is drawn. He shall consider the matter independently as I have not expressed opinion on the merits of the case.

6. The petition is disposed of.

[SMT. RANJANA DESAI, J.]